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No. 7604

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WISE MANUFACTURING COMPANY (a corporation),
Appellant,

vs.

E. W. OLIN, RALPH SITES and BERKELEY PATTERN WORKS,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

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FILED
AUG 17 1935
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

INTRODUCTION.

We sincerely believe that a rehearing in this case is advisable and essential not only to correct an injustice done to appellees, not only to correct the injustice done to numerous other creditors of appellant in whose interest appellees sought the adjudication of appellant as a bankrupt, not only to correct an injustice done to Judge St. Sure whose carefully considered decision has been reversed in a most unusual

manner, but also for the benefit and in the interest of this Court.

In this latter connection we believe that this Court is now on record as being willing to treat a bankruptcy or equity appeal as a trial *de novo* and has abandoned the doctrine as to the finality of the findings of the District Court on matters of conflicting testimony.

We believe that it has gone further in this case and has developed for the purposes of its decision on appeal, facts, not only found otherwise by the District Court on amply supporting evidence, but also has found contrary to the District Court upon independent findings of its own for which there is absolutely no support in the record.

If this Court continues so to leave itself upon record, we believe that no litigant will feel that his cause has any more than begun when the lower Court finds against him. Consequently the business of this Court will be materially increased henceforth.

We believe that this decision, if allowed to stand of record, will also materially increase the work and business of this Court, since by its present decision it has indicated a willingness to abandon the salutary rule set forth by Judge Wilbur in the case of *McCarty v. Ruddick*, 43 F. (2d) 976 which is succinctly stated by Mr. Paul O'Brien as follows:

> "Points not argued in the brief are presumed to be abandoned."
>
> *O'Brien's Manual of Federal Appellate Procedure*, 1934 Supplement, page 101.

The entire basis of the Court's decision as to the concealment of the contracts arises for the first time in the Court's opinion. Counsel for appellant did not have the temerity to urge that these contracts were not contracts of appellant, that Wise was not the *alter ego* of appellant, that these contracts did not constitute an asset of appellant, or that these contracts did not constitute an asset of appellant by virtue of Section 1559 of the California Civil Code. Had counsel done so, it would have been a simple matter for us to answer such arguments. If the salutary rule heretofore announced by this Court is to be abandoned the work of this Court will be greatly increased, since litigants, unsuccessful in the District Court, will be encouraged to appeal even without available grounds, in the hope and expectation that this Court will go outside the briefs to develop arguments of its own upon which to base a reversal. Such arguments may be sound due to the superior legal knowledge of the members of this Court, but, on the other hand, they may be unsound for the reason that they do not have the additional guarantee of accuracy which comes from being subjected to the acid test of argument.

The treasury of appellant, as is apparent both from the findings of the District Court and from the opinion of this Court, had been looted by Hays, Diehl and Wise, the latter acting for and as the corporation, with the result that the numerous small creditors of appellant, who furnished credit in reliance upon the supposition that appellant either had valuable patents or if sold would receive their equivalent, have

been defrauded and are still unpaid. Upon learning that appellant had transferred its patents for the consideration provided in the iniquitous contract of "The Unholy Three", some of the creditors selected three of their number to petition the District Court to have appellant adjudicated bankrupt.

In no other way was it practical for the creditors to obtain their just dues than to have a trustee in bankruptcy appointed who could act for all and at the common expense.*

Two concealments of assets were alleged as grounds for adjudication in the amended petition: (1) The concealment of a contract made in behalf of appellant by Hays, Diehl and Wise under which appellant's valuable patents were transferred, which contract was ratified by the corporation,† and (2) The concealment of certain moneys arising from the sale of tools and equipment of appellant. Both concealments were alleged to have been made with intent to hinder, delay and defraud creditors, and to have extended into the four months period prior to bankruptcy.

A hearing upon this petition was had in the District Court which adjudicated appellant bankrupt upon

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*Judge Wilbur's opinion intimates that appellees' redress as creditors and that of the stockholders of appellant is in the nature of a cause of action for the transfer of appellant's patents without consideration. It is possible, therefore, that this Court may feel that its reversal of Judge St. Sure's decision is not the complete deprivation of redress to defrauded creditors, which as a practical matter it is. The judicial conscience, if an injustice has been done, cannot be thus relieved from the responsibility for its present decision. Exalted though this Court may be, it must nevertheless, like ordinary mortals, take into consideration matters of practical necessity, and face the bald, unvarnished fact that if its present decision stands the creditors of this bankrupt corporation will be unable to collect their claims notwithstanding the fact that appellant has assets which could be reached through the medium of a trustee in bankruptcy.

†Petitioners did not know of the supplemental contracts until the trial.

findings of which the following are the ones most pertinent to the present petition: (1) That the proceeds of the sale of appellant's tools and equipment were concealed in a bank deposit in the name of an employee; (2) That the right flowing to appellant from the Hays, Diehl and Wise contracts were assets of appellant; (3) That these concealments were with the intent to hinder, delay and defraud creditors; and (4) That these concealments continued from the time of their commission to within four months of the filing of the original and amended petitions.

Upon appeal from Judge St. Sure's decision, this Court, contrary to the rule as to the finality of the trial Court's findings where based on conflicting testimony, has entirely disregarded findings (2) and (4) set forth above and has reversed the adjudication upon the following new and independent findings, all of which are either contrary to the weight of the evidence or entirely without support in the evidence: (1) That Wise was not the *alter ego* of the corporation, that appellant had no part in the contracts which disposed of its patents, and, impliedly, that the making of the contracts by Wise was not the act of the corporation, and that they were never adopted, ratified or acted upon by the corporation; (2) That the contracts were not an asset of the corporation; (3) That the contracts were concealed from and not by the corporation; and (4) That the hidden proceeds from the sale of appellant's tools and equipment had all been paid out to creditors prior to the four months period.

A rehearing is now sought for the reasons: That this Court has transcended its true functions by treating an equity appeal as a trial *de novo;* that its decision is based upon newly found facts for which there is either no support in the record or which are directly contrary to the weight of testimony; that it has found that the contracts were not the contracts nor an asset of appellant and were not concealed by appellant upon the erroneous assumption that the acts of Wise, who dominated and controlled the corporation, were not acts of the corporation, and upon the further erroneous assumption that the corporation had never adopted or ratified them; that it was erroneously decided even upon its own erroneous findings that the concealment of a contract for the benefit of a third party is not the concealment of an asset of the third party; that it has erroneously assumed, contrary to the findings of the District Court and without any support in the record, that the proceeds of the sale of appellant's tools were all paid out to creditors; and that it has erroneously decided even upon its own erroneous findings that concealment of an asset of the bankrupt is cured as an act of bankruptcy by the disappearance of the asset.

I.

OF THIS COURT'S NUMEROUS ERRORS OF FACT AND LAW WITH REGARD TO THE CONTRACTS.

1. That the contracts of "The Unholy Three" were adopted, approved and ratified by appellant not only appears from the evidence, but also was found by the District Court, and is apparent on the face of this Court's own opinion. Hence even under this Court's theory of the law the contracts were assets of appellant, concealment of which constituted acts of bankruptcy.

The opinion of this Court states that the contract of February 27, 1930, and the two supplementary contracts of May 8, 1930, and September 1, 1930, were contracts between Wise, Diehl and Hays to which appellant was not a party and that it is a confusion of legal terms to say that appellant owned these contracts. The opinion further states that until appellant exercised its option to receive the benefits, if any, flowing from the contracts, its rights and the rights of its creditors and stockholders arose by reason of the transfer of its patents without consideration. The Court furthermore cites Section 1559 of the California Civil Code to the effect that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, and assuming that there was no approval or election to adopt the contract by appellant, concludes that the corporation had no asset in the contract which could be concealed.

We submit that it does not logically follow from the provisions of Section 1559 of the Civil Code that appellant's only right under a contract for its benefit was to enforce it prior to rescission and to elect to

receive its benefits. Assuming, however, that this were the case, the conclusion reached by the Court is, nevertheless, erroneous, since essential premises of its argument are lacking, namely, that the corporation has not elected nor exercised its option to receive the benefits of the contract and that the corporation had not by ratification made the contracts its own.

If we assume the correctness of the announced rule of law, then the finding of Judge St. Sure that the contracts were assets of the corporation must, under the rule that findings will be construed to support the decision, be read in the light of that law. If, therefore, it was necessary that the contracts be approved, adopted or ratified by the corporation, then the finding that they constituted an asset implies the finding that the contracts were so adopted, approved and ratified by the corporation.

The evidence to support such a finding is clear and convincing. The original contract was made on February 27, 1930, and the two supplementary contracts on May 8, 1930 and September 1, 1930. On December 26, 1930, the stockholders of appellant executed a document entitled "Stockholders' Approval of Assignment of Patents and Patent Applications" by which the transfer, conveyance and assignment of all the patents theretofore made by Wise Manufacturing Company and/or the officers of the corporation was ratified, confirmed and approved, said ratification, confirmation and consent being described as "irrevocable and in no way dependent upon any condition or conditions whatsoever". The document further stated that it

vested complete and unconditional title in Wise Patent and Development Company of all the patents to the extent of any ownership of any legal or equitable interest which the stockholders of Wise Manufacturing Company or any of them might have therein. This document was signed as described on the face of the document by all of the stockholders of Wise Manufacturing Company, namely, by Standard Die & Tool Company Inc., by Roy T. Wise, President, and Pansy Wise. (46, 47.) The only other stockholder was Roy T. Wise himself who had made the contract and who had executed a transfer of patents dated May 8, 1930. (169.) Standard Die & Tool Company who owned the legal title had made an assignment on May 5, 1930 of certain of these patents. (169.) Under date of May 5, 1930 appear resolutions of Standard Die & Tool Company, directing that company to sell, assign and transfer the patents to Wise Patent and Development Company.

Most surprising of all, in the light of the actual decision of this Court, is the statement appearing on the face of its opinion that Standard Die & Tool Company, in which was the legal title, had authorized the transfer of the patents, and that appellant, in which was the equitable ownership, had approved the transfer.

Is it to be assumed that appellant elected to approve the transfer of its patents to Hays, Wise & Diehl, but waived all consideration passing to it therefore?

How, in view of the above findings of two Courts, and the clear and uncontradicted evidence of approval,

adoption and ratification by appellant, can it be said that appellant had no asset in these contracts or that they were contracts of Hays, Wise & Diehl and not of or adopted by appellant.

2. **This court's erroneous theory of the law that a third person for whose benefit a contract has been made has no asset therein but only a right to elect to receive the benefits of the contract and to enforce it until rescinded.**

The only authority cited by this Court in support of its conclusion that appellant had no asset in the contract until it elected to receive the benefits thereunder is Section 1559 of the California Civil Code. It does not logically follow, however, from the statutory provision, that the contracts did not constitute an asset of appellant prior to adoption. The mere statement that the third party may enforce the contract until it is rescinded does not necessarily mean that that is the third party's only right. The statute in question is a mere statement of one of the rights of the third party.

Undoubtedly appellant had a number of causes of action arising out of these transactions which appellant might at all times have enforced and which its trustee in bankruptcy might now enforce. It will not be seriously contested that a right of action is not an asset nor can it be contested that appellant through its officers deliberately and effectively concealed from its creditors the existence of such causes of action. It may be that the primary purpose of Wise, as president and a director of appellant, was to advance the selfish interest of Wise, the individual. There was a

secondary purpose, however, and that was to hinder, delay and defraud appellant's creditors. This was a corporate purpose.

3. **The contracts even if unadopted by appellant and now subject to rescission by the nominal parties thereto, have in fact never been rescinded, and even under this Court's interpretation of the law, still constitute an asset enforceable by appellant or its trustee in bankruptcy.**

Even though we grant every premise assumed by this Court relative to these contracts, the fact still remains that up to the present time the nominal makers of those contracts have never rescinded them. Appellant, therefore, has the right at the present time to adopt or readopt these contracts and to sue thereon for the benefit moving to appellant thereunder. Concealment of this present and existing right constitutes the concealment of an asset of appellant and in and of itself constitutes grounds for adjudication.

4. **This Court erred in holding that Wise was not the alter ego of appellant, in concluding therefrom that his knowledge and acts were not the knowledge and acts of appellant, that his contracts were not contracts nor an asset of appellant and that the concealment of the contracts were concealments from and not by appellant.**

Not the least important of the errors which we submit this Court has committed in its present decision is contained in the following statement in the opinion:

> "The trial court found that Wise acquired all the outstanding stock of appellant about May, 1930, and ever since the corporation has been his alter ego. This finding must be read in the light of the fact that the Standard Die and Tool Company owned 4670 shares of the stock of the Wise

> Manufacturing Company and that the outstanding stock referred to in the finding is the 271 shares which were owned by others. The Standard Die and Tool Company still has outstanding some of its preferred stock. Consequently, it cannot be said that either corporation was the alter ego of Wise or that the contracts of Wise were the contracts of these corporation."

On the strength of the above statement this Court has divorced each and every act of Wise whether individually or in the name of the corporation as an act of the corporation and has likewise eliminated all knowledge of Wise as knowledge of the corporation.

The importance of this rejection of the lower Court's findings cannot be too greatly emphasized, since without it the elaborate sophistry by which this Court comes to the conclusion that appellant had no part in the contracts, that it never adopted the contracts nor elected to receive their benefits, that it had no knowledge of the contracts, and that it never concealed them, but on the contrary the contracts were concealed from it, must assuredly fall of its own weight.

The surprising thing is that in another part of its opinion this Court has set forth facts clearly showing that Wise was the *alter ego* not only of appellant but of both corporations. On page iii of the opinion appears the following statement:

> "Wise owned much more than a majority of the stock of the Standard Die and Tool Company which owned nearly all of the stock of the Wise Manufacturing Company. By reason of this stock

ownership Wise dominated both corporations. He was president of both, and controlled the Board of Directors."

In the light of the decisions which will hereafter be cited to the effect that it is control and domination of the corporation and lack of, or absence of the exercise of the power of restraint, and not necessarily complete stock ownership, which determines whether or not a person is the *alter ego* of a corporation, we submit that this Court has clearly contradicted itself, in that in one place in its opinion it recites facts showing that Wise was the *alter ego* of appellant and in another place in the opinion states that it cannot be said that the corporation was the *alter ego* of Wise.

Moreover the finding of Judge St. Sure on this subject was clear and succinct and is supported by clear and convincing testimony. Judge St. Sure found that in May, 1930, Wise acquired all of the outstanding common stock of appellant and is and ever since said time has been to all intents and purposes the Wise Manufacturing Company. (37.) The testimony clearly shows that the entire outstanding stock of appellant was 4941 shares of common stock. (53.) Of this stock 4670 shares stood in the name of Standard Die and Tool Works. (53.) The remaining 271 shares were acquired and paid for through the escrow. (125.) Standard Die and Tool Works' stock consisted of 694 shares of common stock and 263 shares of preferred stock. Of the common stock Wise owned 660 shares and his wife Pansy Wise owned 34 shares. (52, 171.) Wise therefore owned or controlled 100% of

the common stock of Standard Die and Tool Co. The only stock in either corporation owned or controlled by others than Wise was 258 of the 263 shares of preferred stock of Standard Die and Tool Company. Under any interpretation this was complete control and domination of appellant corporation and lack of the power of restraint in any one else so far as stock holding was concerned.

The record shows, however, in so many words, that Wise controlled and boasted he could control and could cause any purpose agreed upon in the contract of February 27, 1930, to be executed by Wise Manufacturing Company and the Standard Die & Tool Company Inc. (54.)

To assert that under circumstances such as are above described and found, that the acts and knowledge of the stockholder is not the act and knowledge of the corporation is contrary to equity and justice and to the overwhelming weight of judicial opinion. The legal fiction of the corporate entity is after all only a fiction and where that fiction, as here, can serve no purpose but to accomplish injustice and to screen the corporation from the just consequences of its wrongs, the legal fiction will never be permitted to prevail against real substance.

The leading case in this connection is that of *State v. Standard Oil Company*, 49 Ohio State, 137, 13 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. In that case a group of stockholders, comprising practically all of the outstanding stock holdings of the corporation, entered into a certain illegal and monopolistic

trust agreement in their individual capacities in order to conceal the real nature of their action. The property and business of the corporation were affected in the same manner as if their action had been done in the name of the corporation and by formal resolution of the board of directors. Just as is suggested by the Court here, although appellant did not have the temerity to urge it, the corporation argued that the legal entity as such was not affected by acts or agreements of the stockholders. The Court disregarded this argument and held in substance that the acts of the stockholders were in legal effect the acts of the corporation. In so deciding, Judge Minshall said:

> "* * * All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim, *in fictione juris subsistit aequitas,* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. * * * 'It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' * * * 'They were invented for the advancement of justice, and will be applied for no other purpose'."

To hold that the acts of Wise, the President and a director of appellant and of the corporation which owned all of its stock, except that portion which was owned by Wise and his wife, and who had complete control and domination of appellant and boasted of this fact, there being no power of restraint in any

one else, were not the acts of the corporation in order to permit the corporation to conceal assets from its creditors, would be subversive of the ends of justice.

This was clearly brought out by the United States Circuit Court for the Eighth Circuit in *Badders Clothing Co. v. Burnham-Munger-Root D. G. Co.*, 228 Fed. 470. In that case, a petition in bankruptcy had been filed against the corporation, charging preferential payments to creditors when insolvent and concealment of the corporation's property, with intent to hinder, delay and defraud creditors. The adjudication was granted and sustained in the Circuit Court in spite of the contention made that the acts claimed to be acts of bankruptcy were those of one George S. Badders for his own personal benefit and should therefore not be attributed to the corporation.

The facts were identical with those in the instant case, as is brought out by the following language of Circuit Judge Hook:

> "Badders was the *president of and dominated the company. He exercised unrestrained control over its affairs. If the power of restraint was elsewhere, it does not appear to have been exercised. Neither the directors nor other stockholders, if there were any with substantial holdings, interfered.* He was practically the corporation in the conduct of its business. The evidence shows a plan and purpose to defraud its creditors which were in course of accomplishment when arrested by the bankruptcy proceedings. Its stock of goods was being sold, in some instances at a sacrifice, and the proceeds taken by Badders and used in such ways as to put them beyond the

reach of corporate creditors. *If a corporation engages in a plan to hinder and defraud its creditors by concealing or transferring its property, the proof is primarily found in the conduct of its officers in authority, and where part of the plan is their individual enrichment at the expense of the creditors, the distinction between official and personal acts should not be drawn too nicely.* The ultimate disposition of the corporate property or its proceeds, however made, may be the very effective act which was intended to hinder or defraud the creditors. Having ventured upon the wrongful course, it may even act through agents who have no official relation to it. We are not now speaking of contracts ultra vires. Nor does it follow that every wrongful act of an officer is the act of his corporation. It may be unauthorized or be a trespass upon the corporate rights. But if the officer acts within the authority with which he has been clothed and others are injured, the same consequences follow as in the case of a natural person. *It is worthy of note in this case that the bankrupt joined Badders individually in resisting preliminary efforts in the bankruptcy court to uncover the transactions and disclose corporate assets.*" (Italics ours.)

If we should use the name "Roy T. Wise" instead of "George S. Badders" in the foregoing quotation, it would be difficult for one conversant with the facts of the instant case to discover that Judge Hook's opinion was not written herein.

In the final analysis, the only ground upon which this Court has held Wise not to be the *alter ego* of appellant is that some 258 shares of the preferred

stock of Standard Die & Tool Company, were owned by persons other than Wise. Complete ownership and control of all the stock, however, is not essential to a determination that a certain person is the *alter ego* of the corporation. Such determination depends of course to a large measure upon the matter of the stockholdings, in that the stock ownership normally indicates control, but complete ownership is not an essential feature. The essential elements are control and domination of the corporation, and absence of the power of restraint.

In the *Badders Clothing Company* case, supra, it appears that there were other stockholders besides George S. Badders, which is sufficient indication that it is not essential in the Eighth Circuit that all the stock must be in the one man to hold him the *alter ego* of the corporation.

In *McCormick Saeltzer v. Grizzly etc. Co.*, 74 Cal. App. 278, 285, the Court says:

> "In order to cast aside this legal fiction 'the law is not scrupulously particular in discriminating between the contracts of *one who practically owns all the stock of a corporation and controls its affairs*, as to whether he has executed a contract relating to the corporate business in his individual or corporate capacity'. (Swarz v. Burr, 43 Cal. App. 445 (185 Pac. 411).)" (Italics ours.)

Nor does the fact that Wise's control came through the stockholdings of Standard Die and Tool Company, which he in turn controlled, affect the situation.

> *United States v. Milwaukee Refrigeration Transit Company*, 142 Fed. 247 at 253 to 256.

If this Court recognizes, in view of the above uncontroverted facts and the law cited, that it has erred in not holding Wise the *alter ego* of appellant, it will, we submit, recognize that it has likewise erred in concluding that the contracts were not contracts of appellant, that they were not an asset of appellant and that they were not concealed by appellant.

Before passing to our next topic, we would like to call the Court's attention to the fact that even eliminating the *alter ego* doctrine from consideration, the record discloses that the corporation acting in its official capacity was an actual party to and not merely a third party beneficiary of the contracts. By resolution of April 11, 1930, it appears that Wise had asked authority to negotiate a loan in the corporation's name pending the sale of the corporate assets to Diehl and Hays et al. (105.) Such a resolution was passed authorizing the president and secretary to execute the required document in the corporate name and under the corporate seal. (105.) We submit that this in and of itself clearly shows knowledge of the corporation of the proposed sale and that the corporation was authorizing Wise to deal concerning the transfer of its patents. In appellant's minutes of January 27, 1930, appears the statement that Wise had discussed with the directors his conference with Mr. Hays and discussed the probability of an outright sale. (103.) Can it be said in the light of these minutes that the corporation was not a party to the deal eventually made by Wise, just because in making the sale he incidentally tried to make a personal profit?

We further submit that the language of the contract of February 27, 1930, is such that it purports to bind the appellant corporation and further that it was not necessary to constitute this contract the contract of the corporation that it be adopted by the corporation.

In order to make the contract the contract of appellant and to give to it the benefits thereunder, it is erroneous to treat it simply as a third party beneficiary which would have to elect to receive such benefits before they became an asset. On the contrary, once this contract was executed appellant had the right to reject the same rather than the right to elect to accept it.

The Court's present opinion is tantamount to a holding that because Wise, Hays and Diehl attempted to deprive the creditors and other stockholders of a large portion of the consideration for their patents that therefore appellant is to be deprived even of the pittance which the freebooters Hays and Diehl and the violator-of-his-trust Wise were willing to accord it.

In urging in the foregoing discussion that the contracts were to the extent indicated and for the present purpose contracts of the corporation, we do not wish the Court to lose sight of the further and controlling argument that the actual transfer of the patents by appellant was sufficient to constitute an adoption by it of the contract, nor do we wish to be of record as admitting that the trustee in bankruptcy may, if he so desires, elect to set aside the contracts as being obtained by fraud.

II.

OF THIS COURT'S ERRORS OF FACT AND LAW WITH REGARD TO THE HIDDEN DEPOSIT OF PROCEEDS OF SALE OF TOOLS AND EQUIPMENT OF APPELLANT.

1. The Circuit Court's unusual procedure in determining a bankruptcy appeal by trying the facts de novo has already been demonstrated. Its finding that the proceeds of the sale of appellant's tools and equipment were all paid out in preference to creditors is an extraordinary illustration of this procedure. Herein of its misinterpretation of the stipulation.

It is admitted, and both Courts find, that approximately $600.00 of appellant's money was deposited in the personal bank account of Huldur Jacobsen, appellant's stenographer, in order to avoid attachment by creditors (i. e., to hinder and delay if not to defraud creditors).

It is well established that an existing state or condition will be presumed to remain the same until proof is brought to establish the contrary, or that the object or purpose of the state or condition once in existence is completed.

Sheldon v. Gesellschaft, 28 Fed. (2d) 449.

We submit that there is no evidence in the record to show that any portion of this money was paid as preference to creditors of appellant or that the purpose of the concealment has been accomplished.

Appellant attempted at the trial to establish the lacking proof by stipulation, but an examination of the record with reference to the attempted stipulation shows that nothing was agreed to beyond the fact that $184.85 went to pay attorneys' fees (but it is not

shown that they were attorneys' fees owing by appellant), and $345.55 was withdrawn by Huldur Jacobsen from the bank account (but it is not shown that this $345.55 was applied by her to the payment of salary or that appellant was indebted to Huldur Jacobsen for salary). The balance of the fund, consisting of some $81.60, was not even attempted to be explained.*

The District Court, which heard the stipulations in the course of their making, had no difficulty in construing them correctly, as above set forth. The District Court was also able to estimate the importance of appellant's failure to put Wise or Miss Jacobsen on the stand to supply the obvious defects in appellant's proof. It, therefore, had no difficulty in making the finding that the sum of $612.00 was an asset of respondent and was concealed by respondent and that the concealment continued from the time of its original commission up to within four months of the bankruptcy.

If this Court's decision on the law is correct, then this finding must be read in the light of additional implied findings that the attorneys' fees paid were not attorneys' fees owing by appellant, that Huldur Jacobsen was not a creditor and the sums now in her possession were not applied to the payment of her salary, that the balance of the fund is entirely unexplained and is still in Huldur Jacobsen's possession, and that the entire fund can be recovered from the

*This Court will not deny that the amount of the concealment does not affect the act as an act of bankruptcy. Even $1.00 concealed would be sufficient for the adjudication.

persons holding it, or who received it, by the trustee in bankruptcy.

This Court, however, in an obviously inferior position to the judge who tried the case, in that it had no background upon which to guide its reasoning, has jumped to the conclusion that all of the fund was paid to creditors as preferential payments, although counsel for petitioners carefully refrained from admitting that any part thereof was so applied.

An examination of the record in this regard may be enlightening: As petitioners began to develop their proof as to this fund, Mr. Clark, counsel for respondent, interrupted with a suggestion that a stipulation as to the facts be made. (75.) He then stated that he had a letter from Miss Jacobsen, showing her withdrawals of the final balance of the fund in 1931, and that she had charged that balance against a claim for unpaid salary, etc. (75, 76.) Mr. Clark's narration of the facts was nothing more than an offer to stipulate, which was refused by Mr. Resleure, who stated: "I do not think I can go as far as that with the stipulation." (76.)

Mr. Resleure then offered to state how far he was willing to stipulate but was interrupted by Mr. Clark, who stated he had a letter from Mr. Sorrick, manager of the Berkeley Branch of the Bank of America. Thereupon Mr. Resleure asked to be shown that letter, but it was not produced. Instead, Mr. Clark said, "I will show you the letter from the lady." Mr. Resleure stated he was not interested in the lady's letter,

that she should be in Court for cross-examination. (76.)

Mr. Clark next stated ex gratia that when she got down to $430.00 she took the balance and said that he had Miss Jacobsen's and Mr. Sorrick's letter. Neither letter went into evidence and there was no stipulation consenting to Mr. Clark's statement. (76.)

Thereupon, the following was agreed to by both counsel:

> An account was opened in the name of Huldur Jacobsen on June 25, 1931. Deposits totaled $612.00. The account was closed November 23, 1931, by the withdrawal of the then balance of $430.00. The funds deposited in the name of Huldur Jacobsen represented monies of appellant and were derived from the sale of tools belonging to it. The object of putting the fund in this account was to prevent creditors of appellant from ascertaining its existence and to avoid it being attached by creditors. (76, 77.)

Mr. Clark then asked that it be stipulated that the account was closed in the manner indicated by Miss Jacobsen's letter. Mr. Resleure stated he would not go that far and that he would like to have Miss Jacobsen to cross-examine her as to what happened to these funds. (78.)

Then follows a further attempt by Mr. Clark to get the stipulation as to what was done with the funds, but no consent thereto was given by Mr. Resleure except that he corrected the original stipulation as to the balance being $530.00, and not $430.00. (78, 79.)

It was then stipulated that the $530.00 was withdrawn by Huldur Jacobsen but it was not agreed for what purpose or how it was applied.

Again Mr. Clark attempted to secure a stipulation that the money was applied to the payment of salary, but Mr. Resleure stated:

> "We won't stipulate that the $184.85 went to pay attorneys' fees and we won't stipulate that the $345.55 went to pay prior salaries." (80.)

It was, however, stipulated that Huldur Jacobsen took the money and Clark, Nichols & Eltse have not been able to collect it,* and that $184.85 was received by Clark, Nichols & Eltse on account of attorneys' fees but it was not agreed that the attorneys' fees mentioned were owing by appellant.

As to the $184.85 received by Clark, Nichols & Eltse as attorneys' fees, there is no showing that these attorneys theretofore performed legal services for appellant. They had, however, performed services for Wise, individually, in connection with the attempt to freeze out the stockholders through the escrow. In view of the District Court's finding that the entire amount is an asset, it may well be that the District Court assumed that Clark, Nichols & Eltse received appellant's money to pay Wise's personal bill. If so, the $184.85 is still recoverable from Clark, Nichols & Eltse.

The $345.55 went to Miss Jacobsen, but inasmuch as there is no showing that she was a creditor or that

*This statement that the attorneys had tried to get back the money indicates that Miss Jacobsen was not entitled thereto.

she was entitled to or did apply the money to the payment of salary, this portion of the fund is still recoverable from Miss Jacobsen by the trustee in bankruptcy, in so far as the present record is concerned.

As to the remaining $81.60, there is no showing what was done with it. The fund was depleted by that amount, but there is no showing what was done with it. We may therefore assume that as to the $81.60 it is still in Miss Jacobsen's possession, or that she used it for purposes of her own and that it is still recoverable. As previously stated, it needs only $1.00 to be concealed to constitute an act of bankruptcy.

With all due deference to this Court, we are frank to say that in a case of this kind, where the lower Court has described the entire case and the transactions referred to as "tainted with fraud and concealment, warranting a full and complete investigation through the process of the bankruptcy Court," and, where, as a practical matter, innocent creditors have no other means of redress than through the processes of the bankruptcy Court, we are amazed to find such a strange construction of this stipulation exerted in order to deny an adjudication which, if granted, will protect innocent creditors and which, if denied, will protect a guilty and fraudulent bankrupt and preserve to the looters of the treasury of that bankrupt their ill-gotten profits.

2. The Court's error in holding that concealment terminates upon disposition of the fund concealed.

Even assuming that the fund had disappeared and could not now be recovered, this Court's decision would still be erroneous.

There is absolutely no authority to support the Court's ruling that a concealment ends as an act of bankruptcy with the paying out of the fund. This Court cites no authority for this proposition of law. Appellant was unable to cite any authority in support of the same contention, except two cases which were clearly not in point. Appellees, however, cite cases to the effect that an act of concealment is complete when performed and that it is not necessary to a fraudulent concealment that the money should be retained for any definite or indefinite time.

> *Kalin v. United States,* 2 Fed. (2d) 58, 59;
> *United States v. Knickerbocker,* 66 Fed. (2d) 388, 390.

These cases cited by appellees were bankruptcy cases but were of a criminal nature. They constitute, however, persuasive authority.

We know of but one case in the law where proof of the *corpus delicti* is necessary to establish guilt. That exception to the general rule is in the case of murder. In all offenses, such as larceny, burglary, embezzlement, obtaining money under false pretenses, which minor misdeeds are more nearly akin to the acts of appellant and "The Unholy Three" in this case, the act is sufficient. It is not ordinarily necessary to pro-

duce the fund or to show that it still constitutes an asset that can be recovered.

We submit that if this new rule announced by this Court should be allowed to stand the Ninth Circuit and the enormous territory over which its judicial determinations constitute the law will become the Mecca and haven of that not least of the parasites on modern business—the crooked and corrupt bankrupt.

If this new rule of law is to stand, then Moses and Brother (of General Average fame) may hereafter open up in any city or town in the Ninth Circuit, contract debts for merchandise, sell his stock and conceal all proceeds (possibly in the name of his mythical brother), and to his innocent creditors, who may seek to have his operations investigated by the Bankruptcy Court, give the age-old gesture of ridicule and defiance, provided he can establish that he no longer has the money.

Such is not, never has been, and should not be the law. With all the recent attempts to correct evils in bankruptcy procedure and practice, it is certainly to be deplored if this Court should allow itself to remain on record as depriving creditors of their remedy through the processes of the Bankruptcy Court by this newly announced doctrine, the product of pure sophistry on the part of this Court.

We further submit that the decisions do not support this Court's statement that the purpose of confining acts of bankruptcy to the four months' period is in order to facilitate the recovery by the trustee in bank-

ruptcy of the property which has been concealed. The four months' doctrine is one which establishes any preferential transfer as a presumptively fraudulent preference. It has never been the rule that the trustee cannot go back of the four months' period and by proof of actual fraud recover back for creditors the fraudulently transferred asset.

CONCLUSION.

In conclusion, we crave indulgence, if, in our ardor, begotten of a consciousness of a serious injustice we feel has been done, not only to our clients, but to numerous other creditors, we have failed to soften with conciliatory phrases our comments on the opinion of this Court.

We believe that these innocent victims of the corrupt manipulation of appellant's business and assets have no practical redress except through the processes of the bankruptcy Court.

We believe that an injustice has been done to Judge St. Sure, whose carefully considered decision this Court has reversed in the unusual manner we have described.

We believe that the present opinion of this Court, if allowed to stand, opens the way for untold appellate litigation by litigants who will feel that the findings and decision of the lower Court mean nothing in this type of appeal.

We believe that the present opinion of this Court, if allowed to stand, opens a way for every fraudulent bankrupt to carry on without fear of investigation by the bankruptcy Court and without prospect in most cases of being deprived of his ill-gotten gains.

We believe that if ever the remedy of a rehearing, provided for in the rules of this Court, should be granted, it is in this case.

We pray that our petition be considered and that it be granted.

Dated, San Francisco,
August 16, 1935.

Resleure, Vivell & Pinckney,
Floyd B. Cerini,
Eugene R. Elerding,
Attorneys for Appellees and Petitioners.

Certificate of Counsel.

I hereby certify that I am one of the attorneys for appellees and petitioners in the above entitled cause, that in my opinion the foregoing petition for rehearing is well founded in point of law as well as in fact, and that said petition for rehearing is not interposed for delay.

Dated, San Francisco,
August 16, 1935.

J. F. Resleure,
Attorney for Appellees and Petitioners.